85-1116

Supreme Court, U.S.
FILED
DEC 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In the Supreme Court of the United States

October Term, 1985

THE CITY OF WHITTIER, a Charter City, *et al.*,

Appellants,

v.

WALNUT PROPERTIES, INC., a California corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

BURKE, WILLIAMS & SORENSEN
J. ROBERT FLANDRICK,* CITY ATTORNEY, CITY OF WHITTIER
KATHERINE E. STONE
BENJAMIN S. KAUFMAN
LISA E. KRANITZ
One Wilshire Building, 11th Floor
624 South Grand Avenue
Los Angeles, California 90017
Telephone: (213) 623-1900
Counsel for Appellants
*Counsel of Record

Westside Law Publishers Los Angeles, California (213) 477-0491

QUESTIONS PRESENTED

By an unpublished Memorandum, a panel of the Ninth Circuit Court of Appeals held unconstitutional Whittier's adult business zoning regulations which had previously been held facially valid in a prior state action between the same parties. *City of Whittier v. Walnut Properties, Inc.*, 149 Cal.App.3d 633, 197 Cal.Rptr. 127 (1983) (App. F, 45a). The questions presented are:

1. Are the federal courts required to respect state court processes and give preclusive effect or abstain from the exercise of jurisdiction where a state action is filed two years before a federal case involving the identical issues and parties, and the state appellate court's published opinion is final before the federal district court enters its judgment?

2. Where a city adopts an adult business zoning ordinance after seven months of study, which includes several public hearings at which evidence is presented showing that increased crime rates and decreased property values resulted from the concentration of thirteen adult businesses in the city, where other sites are available for such businesses, and where there is no evidence of improper motivation on the part of any legislator; is such an ordinance properly invalidated because three years later, in a deposition, a city official, not a member of the legislative body, states that in his opinion churches are morally opposed to "the display of the human body?"

PARTIES TO THE PROCEEDINGS

In addition to the City of Whittier, California, a Charter City, the following are also Appellants in this Court: M.D. Klaxton, R.L. Henderson (Mr. Henderson is no longer a member of the Whittier City Council; Councilmember Sabina Schwab replaced Mr. Henderson at the 1984 election), L.A. Strong, Gene Chandler, and V.A. Lopez, as members of the Whittier City Council; James Bale, as Chief of Police of the City of Whittier; and J. Robert Flandrick, as City Attorney of the City of Whittier.

Walnut Properties, Inc., a California corporation, is Appellee before this Court.

TABLE OF CONTENTS

Page

Questions Presented i
Parties To The Proceedings ii
Table Of Authorities iv
Opinions Below 1
Jurisdiction 2
Pertinent Constitutional Provisions And Statutes 3
Statement Of The Case 3
The Questions Presented Are Substantial 10

1. Res Judicata Bars The Federal Courts From Rejudging The Justification For The Regulations 11
2. The Federal Courts Should Have Abstained From Exercising Jurisdiction In This Case 12
3. The Ninth Circuit Panel's Treatment Of Legislative Motive Was In Error 14
   a. Judicial Review of Legislative Motivation is Improper 14
   b. If Motive is to be Examined, the Ninth Circuit Panel Applied the Wrong Standard 16
   c. There Was No Evidence That Any Member of the City Council Had an Improper Motive 18
4. Whittier's Adult Business Regulations Are Valid Under *Young* 19
   a. The Regulations are Justified 19
   b. The Regulations do not Suppress or Unreasonably Restrict Access to or for Adult Businesses 22

Conclusion 24

TABLE OF AUTHORITIES CITED

Cases Page

Benenson v. United States, 385 F.2d 26 (2d Cir. 1967) 9
Beverly Hills Nat'l Bank v. Glynn, 267 Cal.App.2d 859, 73 Cal.Rptr. 808 (1968) 12
Beverly Hills Nat'l Bank v. Glynn, 16 Cal.App.3d 274, 93 Cal.Rptr. 907 (1971) 12
Central Ave. News, Inc. v. City of Minot, N.D., 651 F.2d 565 (8th Cir. 1981) 13
City of Las Vegas v. Foley, 747 F.2d 1294 (9th Cir. 1984) 17
City of Renton v. Playtime Theatres, Inc., No. 84-1360 ..... 3, 4, 14
City of Vallejo v. Adult Books, 167 Cal.App.3d 1169, 213 Cal.Rptr. 143 (1985) 21
City of Whittier v. Walnut Properties, Inc., 149 Cal.App.3d 633, 197 Cal.Rptr. 127 (1983) ..... passim
Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 2
Ebel v. City of Corona, 698 F.2d 390 (9th Cir. 1983) 17, 21
Ebel v. City of Corona, 767 F.2d 635 (9th Cir. 1985) 17
Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) ... 21
Fletcher v. Peck, 6 U.S. (2 Cranch) 87 (1810) 15
Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), *cert. denied,* 447 U.S. 929 (1980) 17
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) 12, 13
Judice v. Vail, 430 U.S. 327 (1977) 13
Lydo v. City of Las Vegas, 745 F.2d 1211 (9th Cir. 1984) 17
Martin v. Hamil, 608 F.2d 725 (7th Cir. 1974) 9

Michael M. v. Sonoma County Superior Court, 450 U.S. 464 (1981) 15, 16
Middlesex County Ethics Committee v. Garden State Bar Ass'n., 457 U.S. 423 (1982)..... 13, 14
Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984) 11
Moore v. Sims, 442 U.S. 415 ..... 13, 14
New Orleans v. Duke, 427 U.S. 297 (1976)..... 2
Nortown Theatre v. Gribbs, 373 F.Supp. 363 (E.D. Mich. 1974)..... 15
Pacific Gas & Electric Co. v. Energy Resources Conservation and Development Commission, 461 U.S. 190 (1983)..... 16
Palmer v. Thompson, 403 U.S. 217 (1971)..... 16
Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527 (9th Cir. 1984), *prob. juris. noted,* ___ U.S. ___, 105 S.Ct. 2015 ..... 17, 23
Salaman v. Bolt, 74 Cal.App.3d 907, 141 Cal.Rptr. 841 (1977)..... 11
Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) 10
Strand Properties, Inc. v. Municipal Court, 148 Cal.App.3d 882, 200 Cal.Rptr. 47 (1983)..... 21
Tovar v. Bellmeyer, 721 F.2d 1260 (9th Cir. 1983), *cert. denied,* ___ U.S. ___, 105 S.Ct. 223 (1984) 17, 19
Toucey v. New York Life Ins. Co., 314 U.S. 118 (1941)..... 10
Trainor v. Hernandez, 431 U.S. 434 (1977)..... 13
United States v. O'Brien, 391 U.S. 367 (1968) 15, 16, 19
Village of Arlington Heights v. Metro Housing Corp., 429 U.S. 252 (1977)..... 15, 16, 17, 19
Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)... 13

Walnut Properties, Inc. v. City Council of the City of Long Beach, 100 Cal.App.3d 1018, 161 Cal.Rptr. 411, *cert. denied,* 449 U.S. 836 (1980) 17, 21
Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976)..... 2, 5, 13, 14, 19, 20, 21, 22
Younger v. Harris, 401 U.S. 37 (1971)..... 12, 13, 14

Statutes

28 United States Code
§ 1254 2
§ 1343 2
§ 1738 3
§ 2403 2
42 United States Code
§ 1983.....2
California Government Code
§ 65906 22

Rules

Supreme Court Rule 28.4(c) 2
Federal Rules of Appellate Procedure, Rule 3(c) 9

Miscellaneous

West's California Code Forms, Government, § 37101 - Form 15, p. 227 (2d ed. 1983)..... 4

In the Supreme Court of the United States

October Term, 1985

THE CITY OF WHITTIER, a Charter City, *et al.*,

Appellants,

v.

WALNUT PROPERTIES, INC., a California corporation,

Appellee.

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The unpublished Amended Memorandum of the United States Court of Appeals for the Ninth Circuit, from which this appeal is taken, was filed September 30, 1985, and appears as Appendix A. Other orders and opinions of the court of appeals and district court appear as Appendices B through E.

JURISDICTION

In this action Appellee Walnut Properties, Inc. ("Walnut"), sought injunctive and declaratory relief under 42 U.S.C. section 1983 against enforcement of Whittier's adult business Regulations which were modeled after the regulation approved by this Court in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). Federal jurisdiction was based on 28 U.S.C. section 1343 subdivisions (3) and (4). The district court's judgment held the Regulations "valid and subsisting" except that portion which prohibits the location of an adult business within 1,000 feet of a church which it declared invalid on the ground that there was insufficient evidence before the City Council to support the separation at the time of the public hearings on its enactment. The notice of appeal of Appellants City of Whittier, *et al.* ("Whittier"), was filed March 26, 1984.

The Ninth Circuit panel filed its first unpublished Memorandum on May 14, 1985. On September 30, 1985, the panel denied Whittier's petition for rehearing and filed the Amended Memorandum.

Whittier's notice of appeal was filed in the Ninth Circuit on November 20, 1985. App. K, 87a. Jurisdiction lies in this Court under 28 U.S.C. section 1254(2). *New Orleans v. Duke*, 427 U.S. 297, 301 (1976); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927 n.2 (1975).

Neither court below certified to the California Attorney General the fact that the constitutionality of the Regulations was drawn into question and that 28 U.S.C. section 2403(b) may be applicable. Pursuant to Rule 28.4(c) of this Court, Appellants have served three copies of this Jurisdictional Statement upon the Attorney General of the State of California.

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Title 28, Section 1738 of the United States Code provides in pertinent part:

> [R]ecords and judicial proceedings [of any State, Territory or Possession] shall have the same full faith and credit in every court in the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

The full text of Whittier's Ordinances Nos. 2327, 2257, 2254, 2138, 2121 and 2116 (collectively "Regulations") are set forth as Appendices L through Q, respectively.

STATEMENT OF THE CASE

The Ninth Circuit in this case, as in *City of Renton v. Playtime Theatres, Inc.*, No. 84-1360, held that:

(1) Whittier could not rely on the experiences of other cities to justify its adoption of the Regulations;

(2) No sites were available in Whittier for an adult business to locate by *assuming* that (a) a shopping center owner would not lease to an adult theater; and (b) areas zoned industrial (where commercial *and* industrial uses are expressly permitted and are located) were not constitutionally adequate sites; and

(3) Without any other evidence of an improper motive by any legislator, a motive to suppress protected expression sufficient to invalidate the Regulations could be inferred from a subsequent statement of a city employee.

If this Court reverses the decision of the Ninth Circuit in *Renton,* it should do so in this case for the same reasons.

Unlike the situation in *Renton,* the state courts here had jurisdiction over the parties and the subject matter long before this case was filed in the district court. Two opinions had been issued by the state court of appeal upholding the Regulations before judgment was entered in the district court. App. F, 45a; App. H, 67a.

The unpublished Amended Memorandum is in direct conflict with the published opinion of the California Court of Appeal (App. F, 45a) and is, as a result, causing great mischief. All persons are entitled to rely on the published opinions of state appellate courts for guidance in the conduct of their affairs. In this case, a trap for the unwary exists: the comment to West's California Code Forms, under the heading, "An Ordinance Regulating Adult Businesses" states, "This form is based on an ordinance by the City of Whittier which was upheld in *City of Whittier v. Walnut Properties, Inc.,* 149 Cal.App.3d 633, 197 Cal.Rptr. 127 (1983)." West's California Code Forms, Government, § 37101 - Form 15, p. 227 (2d ed. 1985).

Whittier, like the City of Renton, is a small city (70,000 population) located immediately adjacent to a large metropolitan area (Los Angeles). By 1977, Whittier had experienced a rapid growth of adult businesses. There were thirteen adult businesses, including bookstores, a theater, massage parlors and model studios, in the City

and two more in adjacent unincorporated areas. App. R, 119a. In 1977, Whittier adopted an urgency ordinance (No. 2116, App. Q, 113a) to maintain the status quo so that the problems associated with this rapid growth could be studied. During a seven month study, several public hearings were held, surveys made and the experience of many other similarly situated cities studied. Whittier's study showed, among other things, depreciation in property values and an increase in crime in the area in which adult businesses were located, including prostitution, assault and battery, theft, arson, and sexual offenses, and an influx of drunk drivers and intoxicated persons (the staff report documented a 102% increase in crime in the area where adult businesses were as compared with an 8.3% increase city-wide). App. R, 125a-26a. At the various public hearings, citizens testified of being afraid to walk the streets in these areas, that some businesses had left these areas, and that they were fearful of children being confronted by individuals of offensive character or of being exposed to sexually explicit material. App. R, 126a. There was also evidence of increased traffic and litter, the latter resulting in sexually explicit materials being abandoned and thus made accessible to children. App. R, 126a-27a.

In February 1978, Whittier adopted a zoning ordinance (No. 2138, App. O, 101a) based on *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), which permitted defined adult businesses in commercial or industrial zones, with a separation requirement of 500 feet from residences and 1,000 feet from schools, churches, parks or other public facilities utilized by minors, and other adult businesses. The ordinance validated existing adult businesses as legal nonconforming uses subject to abatement only after an amortization period reflecting their economic life.

Walnut owns and operates, as a part of its Pussycat Theater chain, the Wardman Theatre ("Theater") in the Whittier Village Area of the City. The Theater is within 1,000 feet of four churches, two of which operate full-time parochial elementary schools.

After expiration of the economic-life amortization period applicable to the Theater under the ordinance, the City issued an order of abatement. Similar orders were also issued to other adult businesses which had lost the status of a legal nonconforming use under the Regulations. Walnut appealed the order first to the Planning Commission, then to the City Council, each of which conducted a *de novo* public hearing. Walnut presented no evidence at either hearing, but made only legal arguments.

On April 30, 1979 (two years before this federal action was filed), the City filed an action in the California Superior Court to enforce the abatement order by injunction. The trial court held Ordinance No. 2138 unconstitutional because it construed the provision requiring a 1,000 foot separation of adult businesses from any "public facility which is utilized by minors," as banning all adult businesses. App. J, 85a. Prior to entry of judgment Whittier amended the ordinance to remedy the perceived defect (the amending ordinances, No. 2254, App. M, 93a, an urgency ordinance, and No. 2257, App. N, 97a, are identical; No. 2257 is the subsequent permanent version of No. 2254).

In February 1983, the state court of appeal issued its first opinion (App. H, 67a) holding the Regulations valid as amended. This opinion thoroughly analyzed the Regulations both facially and as applied to Walnut. The Regulations were subjected to "close scrutiny" and found valid. On May 19, 1983, the California Supreme Court

granted Walnut's petition for hearing and retransferred the matter to the court of appeal with directions to reconsider its opinion as to two factual issues: (1) was the Theater an adult business within the meaning of the Regulations, and (2) the availability of alternate sites. *See* App. G, 66a; App. F, 52a-54a.

On December 8, 1983, the court of appeal, after additional oral argument, issued its second published opinion (App. F, 45a), again upholding the Regulations and remanding the matter to the trial court for findings on the two limited issues referred to in the California Supreme Court's order. Walnut's petition for rehearing to the court of appeal was denied on January 4, 1984, and its petition for hearing to the California Supreme Court was denied on February 2, 1984. Walnut did not petition this Court for review.

This federal case was filed on May 7, 1981, after the trial court's judgment in the state proceeding where Walnut had raised and litigated all its constitutional claims. Whittier moved the district court to abstain from exercise of jurisidiction. Before the hearing on Whittier's motion, the district court ordered the proceedings stayed upon stipulation of the parties.

After the first opinion by the California court of appeal was published, the district court, on its own motion, ordered the parties to appear at a series of status conferences and thereafter, notwithstanding the status of the state litigation, ordered the case to trial. Judgment was not entered by the district court until March 9, 1984, well after the California court of appeal's second opinion (App. F, 45a) had become final. The district court's judgment held the Regulations to be,

> valid and subsisting, having been properly and lawfully adopted by the . . . City Council . . .

> [except] that portion . . . which prohibits the location of an adult business within 1,000 feet of a church . . . [which] is declared invalid on the ground that at the time of the public hearing preceding the enactment of the . . . ordinances, there was insufficient evidence presented to the City Council to support its conclusion that this portion of the regulation was reasonably required to protect the public health, safety and general welfare. App. D, 31a-32a.

The Reporter's Transcript ("RT") makes clear that the district court only intended to rule that the 1,000 foot separation was "facially invalid," (RT, at 257) and severed that portion from the remainder of the Regulations which it held valid. *Id.* at 259. The court's judgment enjoined Whittier from enforcing the provision held invalid. App. D, 32a.

After the district court announced its intended decision, Whittier held public hearings at which additional evidence was presented supporting the 1,000 foot separation from a church. Whittier, based upon additional evidence, then readopted that provision as Ordinance No. 2327 (App. L, 89a), and requested the Ninth Circuit take judicial notice of the legislative action.

The panel's first unpublished Memorandum voided all the Regulations because it stated that they "violate" the First Amendment in that they were not shown to justify legitimate government needs, because they restrict protected speech and because one of the City's reasons for enacting the Regulations was to suppress protected speech. App. C, 18a. Whittier filed a timely petition for rehearing. On September 30, 1985, the panel denied the petition for rehearing, rejected Whittier's suggestion for en banc rehearing and filed its Amended Memo-

randum. Contrary to Rule 3(c) of the Federal Rules of Appellate Procedure, the panel decided there were "three factual issues on appeal."[1]

The panel dismissed six years of litigation in the California courts, holding that the state courts had not decided: (1) whether the Regulations were improperly motivated, (2) whether the Regulations furthered an important or substantial governmental interest, and (3) whether alternative sites existed for the Theater to relocate. App. A, 4a. The panel then went on to hold that: (1) a motivating factor of the Regulations was to suppress protected speech, based on a statement made at deposition by Elvin Porter, Whittier's planning director, read into the record by Walnut's attorney on cross-examination in an effort to impeach Porter, that churches were morally opposed to "the display of the human body" (App. A, 8a-9a); (2) that Whittier "offered no evidence to support its argument" that the Regulations furthered an important or substantial governmental interest (App. A, 6a), even though the record before the panel included the staff report documenting the results of Whittier's study, as well as the experience of other cities such as Detroit and Boston (App. R, 119a); and (3) the Regulations severely restrict the availability of protected speech, as the panel assumed that "although the ordinance does not by itself ban adult theatres from Whittier, the reluctance of a shoping center owner to lease to such a theatre and the unlikelihood

[1]App. A, 4a. There was actually only one issue on appeal: whether there was sufficient evidence before the City Council to support the 1,000 foot separation of an adult business from a church. Where appellant appeals only a portion of a judgment, and there is no cross-appeal, the reviewing court lacks jurisdiction to review the non-appealed portion, except for possible jurisdictional issues. *See Martin v. Hamil*, 608 F.2d 725, 730-31 (7th Cir. 1974); *Benenson v. United States*, 385 F.2d 26, 31 (2d Cir. 1967).

of an appropriate vacancy will probably have the same effect" (App. A, 7a). The panel did not expressly state that it was reversing the district court, but its Memorandum is contrary to the district court's judgment that except for the facial invalidity of the 1,000 foot separation from a church the Regulations are "valid and subsisting having been properly and lawfully adopted."

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Respect for state judicial processes is a fundamental tenet of our federal system of government.[2] The assumption of jurisdiction and rulings contrary to the final opinion of the California court of appeal by the federal courts in this case offends a basic principle of federalism. There was no justification for relitigating the case in federal court years after the state court processes had begun with the matter before the states' higher courts. By stipulation and district court order, Walnut was free to continue operating its adult theater without threat of civil or criminal prosecution. The California courts, at all levels, have demonstrated that they are fully capable of fairly and judiciously applying priciples laid down by this Court.[3] The Amended Memorandum

---

[2]*See Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 129-41 (1941) (discussion of history of Congressional attempts dating back to 1793 to avoid intrusion of federal authority into states' judicial processes).

[3]In fact, the state trial court invalidated Whittier's first ordinance under *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), because it perceived a provision (later deleted) as precluding sufficient access within the City for adult businesses. *See* App. J, 85a. After the first court of appeal opinion, the California Supreme Court granted Walnut's petition for hearing and ordered the appellate court to reconsider its factual determination on the question of availability of other sites. *See* App. G, 65a.

secretly overruling the carefully reasoned opinions of California's appellate courts offends this vital constitutional principle.

1. Res Judicata Bars The Federal Courts From Rejudging The Justification For The Regulations

The single most compelling reason for this Court to undertake plenary review of this case is the opportunity it provides to instruct the lower federal courts of the requirement in our federalist system of respecting the processes and decisions of state courts. The facts and circumstances of this case demonstrate an almost complete indifference on the part of the federal courts involved to determinations made in the California court system.

The Ninth Circuit panel correctly stated that res judicata is not applicable when no final judgment is entered by a state court. However, in doing so the panel mechanically followed a general rule which contains numerous exceptions.

As stated in *Salaman v. Bolt,* 74 Cal.App.3d 907, 141 Cal.Rptr. 841 (1977), even though an appellate opinion orders a limited remand, res judicata may prevent relitigation of issues decided in the appellate opinion. Whether res judicata applies in a given case, depends upon the language of the opinion. *Salaman,* 74 Cal.App.3d at 914-15, 141 Cal.Rptr. at 846.

The federal courts must give a state court's judgment the same preclusive effect as would be given that judgment under applicable state law. *Migra v. Warren City School Dist. Bd. of Educ.,* 465 U.S. 75, 81 (1984). Under California law, the decision by the state court of appeal in this case is res judicata on all issues except

the two narrow issues remanded. *Beverly Hills Nat'l Bank v. Glynn,* 16 Cal.App.3d 274, 93 Cal.Rptr. 907 (1971). In *Beverly Hills Nat'l Bank,* the trial court granted judgment for the defendant on the Bank's third and fourth causes of action, holding that there was no consideration for the guarantee executed by the defendant. The appellate court reversed the trial court on this determination, and remanded the case for retrial. *Beverly Hills Nat'l Bank v. Glynn,* 267 Cal.App.2d 859, 868, 73 Cal.Rptr. 808, 813 (1968). On retrial of these two causes of action, defendant again attempted to raise the defense of lack of consideration, contending, as the Ninth Circuit panel held in this case, that under California law a published opinion reversing a trial court and remanding a case has no preclusive effect. The trial and appellate court both held that this defense was foreclosed by the doctrine of res judicata. *Beverly Hills Nat'l Bank,* 16 Cal.App.3d at 288, 93 Cal.Rptr. at 915-16. Therefore, under California law, a case is final for the purpose of applying the doctrine of res judicata, even if there is a remand on some issues. Thus, all issues resolved by the published opinion of the California Court of Appeal (App. F, 45a) cannot be relitigated in this case.

2. The Federal Courts Should Have Abstained From Exercising Jurisdiction In This Case

Because of the ongoing state proceeding, the federal courts should have abstained in this case under the doctrine of *Younger v. Harris,* 401 U.S. 37 (1971) and its progeny.[4] In *Younger,* this Court held that

---

[4]The fact that the Ninth Circuit Memorandum does not address abstention does not preclude this Court from addressing it. In *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 599 (1975), abstention was not raised below, but this Court held that, because of the quasi-

interference by the federal judicial system with on-going state criminal proceedings runs counter to traditional principles of equity, comity and federalism. *Id.* at 44.

This Court has repeatedly held that *Younger* abstention applies to on-going state civil proceedings which involve important state interests.[5] There is no question that the issues in this case "implicate important state interests."[6] *Middlesex County,* 457 U.S. at 432. As this Court has previously stated, "The city's interest in attempting to preserve the quality of urban life is one that must be accorded the highest respect." *Young,* 427 U.S. at 71; *see also Village of Belle Terre v. Boraas,* 416 U.S. 1, 4-6, 9 (1974). In addition, this case implicates important state interests because the state court proceedings to enforce Whittier's order of abatement bears a close relationship to proceedings of a criminal nature. *Huffman,* 420 U.S. at 604-05. Walnut's violation of the Regulations could have been prosecuted as a criminal offense in state court.

Walnut did not reserve any federal claims in the state action.[7] The issue of the constitutionality of the

---

jurisdictional nature of *Younger* abstention, it should consider the issue. In the case at bar, the City filed a motion to abstain in the district court, which expressly ruled abstention not warranted. App. E, 84a.

[5] *Huffman v. Pursue, Ltd.,* 420 U.S. 592 (1975); *Judice v. Vail,* 430 U.S. 327 (1977); *Trainor v. Hernandez,* 431 U.S. 434 (1977); *Moore v. Sims,* 442 U.S. 415, 423 (1979); *Middlesex County Ethics Committee v. Garden State Bar Ass'n.,* 457 U.S. 423, 432 (1982).

[6] At least one circuit court of appeals has held that an ordinance very similar to Whittier's was of sufficient state interest that abstention was appropriate in the face of an on-going state court civil action seeking to enjoin an adult bookstore operator violating the city's ordinance. *Central Ave. News, Inc. v. City of Minot, N.D.,* 651 F.2d 565, 567-68 (8th Cir. 1981).

[7] The state trial court's findings of fact, prepared by counsel for Walnut, state that Walnut "alleged by way of affirmative defense

Regulations were considered by a state trial court, a state appellate court and the California Supreme Court. It is beyond argument that the California courts are able to protect federal constitutional rights.

The history of this case fails to show even minimal respect for state processes. Where vital state interests are involved, the federal courts should abstain unless state law clearly bars the interposition of the constitutional claims. *Moore v. Sims,* 442 U.S. at 426. This Court should take the opportunity which this case provides to instruct the lower federal courts that interference in state court judicial proceedings as evidenced by this case is not to be countenanced.[8]

3. The Ninth Circuit Panel's Treatment Of Legislative Motivate Was In Error

a. Judicial Review of Legislative Motivation is Improper.

Judicial examination into legislative motive constitutes a substantial intrusion into a co-equal branch of

that the ordinance, on its face and as construed and applied to Walnut, violated the free speech, due process and equal protection provisions of the federal and state constitutions." App. J, 85a. Therefore, the element of the *Middlesex County* test requiring an "adequate opportunity" to raise federal claims in the state action is satisfied here. *Middlesex County,* 457 U.S. at 432. The last element of the test, the requirement of a prior state judicial action (*id.*), is obviously met here.

[8]None of the exceptions to *Younger* abstention apply in this case. The fact that Whittier has stipulated on the record that it will not subject Walnut to any additional civil or criminal prosecution pending the outcome of this case and the state litigation demonstrates that the state action was not entered into in "bad faith" or for "harassment." The fact that the Regulations are based on the ordinance approved in *Young* and similar to the ordinance before this Court in *Renton* shows that this is not an "extraordinary" case which presents a "flagrantly and patently" unconstitutional regulation "violative of express constitutional prohibitions in every clause, sentence and paragraph." *Younger,* 401 U.S. at 53-54.

government. The problems inherent in permitting such examination were recognized by this Court 175 years ago in *Fletcher v. Peck*, 6 U.S. (2 Cranch) 87, 130-31 (1810), and they remain today a concern of this Court. *Village of Arlington Heights v. Metro Housing Corp.*, 429 U.S. 252, 268 n.18 (1977). This Court has frequently stated that it "will not strike down an otherwise constitutional motive on the basis of an alleged illicit motive." *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 472 n.7 (1981); *United States v. O'Brien*, 391 U.S. 367, 383 (1968); *see also Arlington Heights*, 429 U.S. at 265.

In *Young*, the test applied by the plurality was "whether the line drawn by these ordinances is justified by the City's interest in preserving the character of its neighborhoods." 427 U.S. at 71. The plurality in *Young* did not speculate about legislative motive, but agreed with the district court, which found a factual basis for Detroit's regulations and held them constitutional because the stated governmental concerns were legitimate. "When, as here, the City has stated a reason for adopting an ordinance which is a subject of legitimate concern, *that statement of purpose is not subject to attack.*" *Id.* at 56 n.11 (emphasis added), *quoting Nortown Theatre v. Gribbs*, 373 F.Supp. 363, 367 (E.D. Mich. 1974).

Justice Powell's concurring opinion did not inquire into legislative motive either; rather it stated that the *O'Brien* test should be utilized. *Young*, 427 U.S. at 83. As explained by this Court in *O'Brien*, "inquiry into congressional motives or purposes are a hazardous matter" because "what motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it. . . ." 391 U.S. at 384. Similarly, in *Arlington Heights* this Court stated:

> Rarely can it be said that a legislative or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions. 429 U.S. at 265; *see also Pacific Gas & Electric Co. v. Energy Resources Conservation and Development Commission,* 461 U.S. 190, 216 (1983).

b. If Motive is to be Examined, the Ninth Circuit Panel Applied the Wrong Standard.

In each of its Memoranda the panel held that the Regulations would be unconstitutional if "*a* motivating reason for the Council's actions was to suppress protected expression." App. A, 8a; App. C, 24a (emphasis added).[9] This is contrary to well established precedent of this Court that even where one asserted purpose is impermissible, if other valid purposes exist the enactment is constitutional. *See Michael M. v. Sonoma County Superior Court,* 450 U.S. at 472 n.7; *Arlington Heights,* 429 U.S. 252. The panel made no

---

[9]The panel's conclusion must, of necessity, be deemed to hold that once an improper motive is inferred, the governing body is forever barred from reenacting the regulations. *See* App. A, 6a. This flies in the face of this Court's statement that it is futile to strike down an otherwise constitutional statute for improper motivation since it would be valid "as soon as the legislature or relevant governing body repassed it for different reasons." *Palmer v. Thompson,* 403 U.S. 217, 225 (1971); *United States v. O'Brien,* 391 U.S. at 384.

inquiry to determine if there were other legitimate purposes which justify the Regulations.

The panel seems to rely on *Arlington Heights* for its "*a* motivating factor" test.[10] This is erroneous. Judicial deference was set aside in *Arlington Heights* only because racial discrimination was involved. Moreover, in *Arlington Heights* this Court's analysis did not end when it found an improper motive; it went on to determine if there were other purposes which would justify the legislation. The panel was presented with ample evidence of legitimate governmental reasons which justify the Regulations. *See* App. R, 119a.[11]

---

[10]Although the panel made no mention of *Arlington Heights* in this case in holding that any illegitimate purpose would invalidate a statute, it did state in *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527, 537 n.17 (9th Cir. 1984), *prob. juris. noted*, ___ U.S. ___, 105 S.Ct. 2015, that this test "is consistent with other constitutional cases regarding land use decisions" and cited *Arlington Heights*.

[11]Over the past two years the Ninth Circuit has failed to apply a consistent standard in analyzing the constitutionality of adult business zoning ordinances. A "real purpose" test has been applied by the court in *Ebel v. City of Corona* (Ebel II), 767 F.2d 635 (9th Cir. 1985); *City of Las Vegas v. Foley*, 747 F.2d 1294, 1299 (9th Cir. 1984); *Lydo v. City of Las Vegas*, 745 F.2d 1211, 1215 (9th Cir. 1984); and *Ebel v. City of Corona* (Ebel I), 698 F.2d 390, 393 (9th Cir. 1983). In other cases, however, the Ninth Circuit has looked to see if there was a single impermissible motivating factor. *Walnut Properties, Inc. v. City of Whittier*, App. A, 8a; *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527, 537 (9th Cir. 1984); *Tovar v. Bellmeyer*, 721 F.2d 1260, 1267 (9th Cir. 1983) *cert. denied*, ___ U.S. ___, 105 S.Ct. 223 (1984). In *Renton*, the court limited this test to where mixed motives are apparent, but there was no such limiting language in this case.

All of these decisions of the Ninth Circuit are contrary to the decision of the Fourth Circuit in *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 829 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980) in which the court stated that it is "best to eschew altogether the 'guesswork' of speculating about the motive of lawmakers [and instead] look in the final analysis to the legislation itself."

c. There Was No Evidence That Any Member of the City Council Had an Improper Motive.

Even if this Court were to overturn past precedent and determine that inquiry into legislative motive is relevant, there is no evidence in the record of improper motive. In its first Memorandum, the panel based its determination of improper motivation upon the incorrect conclusion that Porter, Whittier's planning director, had objectively reported that churches had expressed opposition to displays of nudity. App. C, 24a. The panel also stated that such factors as the timing of the ordinance, the lack of a grandfather clause, and the conditional use permit requirement which by themselves did not support an inference of improper motive, would support such an inference when coupled with Porter's statement. *Id.* at 25a.

In its petition for rehearing, Whittier pointed out: (1) that Porter had not so "reported"; (2) that certified hearing transcripts showed that no statement had been made by anyone regarding purported church aversion to displays of nudity; and (3) that Whittier's municipal code, which had been admitted into evidence, *did* contain a "grandfather clause."

In its Amended Memorandum the panel changed its rationale for its finding of improper motivation, stating that Porter had testified without objection that the justification of the ordinance was that "churches were morally opposed to the display of the human body." App. A, 8a. The court also referred once again to the timing of the ordinance [12] and the lack of a grandfather

---

[12]The original ordinance was adopted to impose a moratorium on the rapid growth of adult businesses in Whittier while a study could be performed. App. Q, 113a. Walnut was already in operation

clause[13] as further evidence of improper motive upon which the district court could properly rely. App. A, 8a-9a. Even though the panel acknowledged that testimony could not be admitted if it speculated about the subjective intentions of the individual legislators (*id.*), it used Porter's statement as evidence of the motives of the City Council.

In *Young*, statements had been made to both the mayor and the common council about pornography being "disgusting." Appendix in *Young* at 26, 48. Had this Court allowed motives of third parties to be imputed to that legislative body it would have had to have found an improper legislative motive. Instead, this Court held that there was a factual basis which justified the ordinance ordinance and made an inquiry into legislative motive pointless. *See also Arlington Heights,* 429 U.S. at 267-70 (motives of third parties not to be imputed to the legislators).

4. Whitier's Adult Business Regulations Are Valid Under *Young*

a. The Regulations are Justified.

Regarding the element of the *O'Brien* test which requires that the regulation further an important or substantial government interest (391 U.S. at 377), the

---

as an adult business at this time. *See* App. R, 120a. It is sheer speculation to presume that the timing of the ordinance was to suppress protected speech and not to study the effects of the recent influx of these businesses. *Cf. Tovar v. Billmeyer,* 721 F.2d at 1264-65.

[13]This is a further example of the panel's failure to respect the California courts. The California court of appeal explicitly held Whittier's amortization of legal nonconforming uses regulation constitutional as applied to Walnut. App. F, 55a-56a. The panel not only rejected this holding, but found this amortization regulation to be evidence of an improper motive.

panel stated that "[t]he City offered no evidence to support its argument." App. A, 6a. The 1978 staff report, presented at the Planning Commission and City Council hearings, documents the results of seven months of study showing the increased crime rates, decreased property values, and nuisances created by the concentration of adult businesses in Whittier. App. R., 119a.[14] That report and the 1983 staff report, when the 1,000 foot separation from a church was readopted, also refer to the experiences of other nearby cities, a similar study conducted by the County of Los Angeles, a report of the American Society of Planning Officials and, of course, the *Young* opinion. The district court was of the view that the original staff report justified the regulation except as to the church separation requirement. The district court did not perceive any rationale for the separation from a church in the staff report because it refused to consider the experiences of other cities relevant. The rationale for separating adult businesses from a church by 1,000 feet is that the separation will keep such uses a block apart[15] so that persons, especially children, attending church schools and other church related activities, are not immediately confronted with the well known secondary effects of

---

[14]The panel rejected Whittier's evidence as to the problems associated with the concentration of adult businesses because "[t]here is no concentration of adult theatres in Whittier; in fact the Wardman Theatre is the only one." App. A, 6a. At the time the staff report was prepared there were thirteen adult businesses within the City. App. R, 120a. The justification for the Regulations must be measured by the conditions that existed at the time of their enactment, not conditions in existence over seven years later.

[15]The panel's fact finding as to the length of the blocks in the City of Whittier is incorrect. In fact, as the map submitted into the record shows, the blocks in the Village area are 600 to 700 feet long. Other City blocks exceed 1,000 feet.

adult businesses. The record below demonstrates that today, as well as historically, churches are used not only for worship, but also as schools,[16] social halls for people of all ages, and for other family oriented activities. These uses are patently incompatible with adult business uses. In fact, such Regulations are commonplace in California. Many reported California cases concerning adult business zoning regulations contain a separation provision relating to churches and adult business.[17]

The church separation is justified by Whittier's interest in preserving the character of its neighborhoods which, as documented in the staff reports, suffered deleterious secondary effects from adult businesses in Whittier. It is not required that the City prove that the zoning regulation is justified as to each and every adult business that may be or want to locate in the City. *See Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388-89 (1926). Nor are unsupported claims of economic hardship sufficient to invalidate the Regulations. As was stated in *Young*, such locational regulations "may indeed create economic loss for some who are engaged in this business. But in this respect they are affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation. The cases are legion that sustained zoning against claims of serious

---

[16]Two schools operated by churches are located within 1,000 feet of the Theater.

[17]The following cases all concerned ordinances which included such a provision: *Ebel v. City of Corona*, 698 F.2d 390 (9th Cir 1983); *City of Vallejo v. Adult Books*, 167 Cal.App.3d 1169, 213 Cal.Rptr. 143 (1985); *Strand Properties, Inc. v. Municipal Court*, 148 Cal.App.3d 882, 200 Cal.Rptr. 47 (1983) (City of San Diego); *Walnut Properties, Inc. v. City Council of the City of Long Beach*, 100 Cal.App.3d 1018, 161 Cal.Rptr. 411, *cert. denied*, 449 U.S. 836 (1980).

economic damage." 427 U.S. at 78 (Powell, J. concurring) (citation omitted).

If zoning regulations operate unfairly as applied to a particular use, the proper procedure is to seek a variance. Cal. Gov't. Code § 65906. Walnut never sought a zone variance or submitted any evidence to Whittier that the Regulations would create a hardship as to it. *See* App. F, 45a.

b. The Regulations do not Suppress or Unreasonably Restrict Access to or for Adult Businesses.

Porter, the planning director, testified that within Whittier, of the 742.5 acres zoned for adult uses (C-2 and M), 99.5 acres, or 13.4% of the total, are available to adult businesses under the Regulations' locational requirements.[18] These sites are along major thoroughfares, in economically viable areas of the City, in one of the two shopping centers located in the City, but not in Whittier's central business district. The panel was apparently of the view that an adult theater has a vested constitutional right to locate in a central business district. The shopping center site was discarded by the panel with the unsupported conclusion that "the reluctance of a shopping center owner to lease to such a theatre and the unlikelihood of an appropriate vacancy" makes the shopping center constitutionally unavailable. App. A, 7a. There is no evidence in the record to support this conclusion, and it is contrary to the determination of the district court. There are no general release theaters in Whittier's central business district. The only general

---

[18]The Ninth Circuit panel incorrectly described the testimony of both Mr. Porter and Walnut's witness, Mr. Metcalfe, a real estate appraiser. *See* RT, at 113, 134-35, 164.

release theater is located in one of the City's two shopping centers, which is also available for Walnut's theater under the Regulations.

Were general release theaters subject to the same locational requirements would "the reluctance of a shopping center owner to lease to such a theatre and the unlikelihood of an appropriate vacancy" invalidate the zoning? Does an adult business or for that matter, any theater, have a constitutional right to locate "downtown?"

Finally, without explanation or reason, the panel concluded that an area zoned industrial, but in which commercial uses are permitted, and, in fact, flourish, is constitutionally unsuitable for adult businesses. *See* App. A, 7a-8a.

The approach of the Ninth Circuit in this and the *Renton* case has been to elevate adult businesses over all other First Amendment activities, such as churches, which are subject to zoning and other licensing requirements, and to ignore the market factors beyond a city's control. This Court should grant plenary review to instruct the federal courts on the need to respect legislative solutions to the problems caused by the secondary effects of adult businesses.

CONCLUSION

For the reasons expressed above, this Court should note probable jurisdiction and accept this case for plenary review or at least hold this appeal pending this Court's disposition of the *Renton* case.

Respectfully submitted,

BURKE, WILLIAMS & SORENSEN

J. ROBERT FLANDRICK, CITY ATTORNEY,
CITY OF WHITTIER

KATHERINE E. STONE

BENJAMIN S. KAUFMAN

LISA E. KRANITZ

Counsel for Appellants
THE CITY OF WHITTIER, a Charter City, et al.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on December 27, 1985, I served the within *Jurisdictional Statement* and *Appendix to Jurisdictional Statement* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Stanley Fleishman, Esq.
2049 Century Park East
Suite 3160
Los Angeles, California 90067

The Honorable John Van De Kamp
Attorney General
555 Capitol Mall
Suite 350
Sacramento, California 95814

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 27, 1985, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)